SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 1149

LOUIS H. MOONEYHAN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Petitioner Louis H. Mooneyhan prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on January 8, 1969, denying petitioner's petition for rehearing and adhering to its original opinion rendered December 5, 1968.

OPINIONS BELOW.

The decision of the Tax Court of the United States (Appendix, *infra*, p. A-1) was filed March 29, 1967, was entered on April 6, 1967 and is reported at 47 T. C. 693.

The opinion of the Court of Appeals (Appendix, *infra*, p. A-25) rendered December 5, 1968, is reported in 404 F. (2d) 522. A petition for rehearing was filed within the time allowed under Rule 40 of the Federal Rules of Appellate Procedure for the United States Court of Appeals effective July 1, 1968. The order of the Court entered January 8, 1969, denying the petition for rehearing (without opinion) is not yet reported (Appendix, *infra*, p. A-35).

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed, was pronounced on December 5, 1968, and was entered on the same date. The order of the Court of Appeals denying the rehearing was made and entered on January 8, 1969. The jurisdiction of this Court to review the judgment or decree in question by Writ of Certiorari is conferred by 28 U. S. C., Section (1958 ed.) 1254 (1). This Petition for Certiorari is filed within the time allowed by 28 U. S. C., Section (1958 ed.) 2101 (c).

QUESTION PRESENTED.

Whether within the meaning of Section 911 (a) (2) of the Internal Revenue Code of 1954 (26 U. S. C. 1958 ed.) petitioner's compensation (received in the years 1959, 1960, 1961 and 1962) herein involved, for work in Iran was paid by the United States, or an agency thereof, so as to be subject to United States income tax or whether it was paid by Iran and hence not subject to such taxes.

STATUTE INVOLVED.

The statutory provisions involved are those found in Section 911 of the Internal Revenue Code of 1954, 26 U. S. C. 1958 ed., Section 911 as follows:

"Subpart B—EARNED INCOME OF CITIZENS OF UNITED STATES.

Sec. 911. Earned income from Sources without the United States.

(a) General Rule.—The following items shall not be included in gross income and shall be exempt from taxation under this subtitle: . . .

(2) PRESENCE IN FOREIGN COUNTRY FOR 17 MONTHS.—In the case of an individual citizen of the United States who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days in such period, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) which constitute earned income attributable to services performed during such 18-month period. The amount excluded under this paragraph for any taxable year shall be computed by applying the special rules contained in subsection (c)."

REGULATIONS.

Treasury Regulations Section 1.911-1 (b) (1)—"Qualifications for exemption" provides:

"Subject to the limitations in subparagraph (2) of this paragraph, amounts constituting earned income as defined in section 911 (b) shall be excluded from gross income in the case of an individual citizen of the United States who during any period of 18 consecutive months is present in a foreign country or countries during a total of at least 510 full days, if such amounts are (i) from sources without the United States, (ii) attributable to such period and (iii) not paid by the United States or any agency or instrumentality thereof."

STATEMENT OF FACTS.

These proceedings began when petitioner filed in the Tax Court his petition for a redetermination of deficiencies determined by the Commissioner of Internal Revenue in petitioner's income tax for the calendar years 1959, 1960 1961, and 1962. In 1961 petitioner had been refunded the tax withheld from his 1960 compensation. The Tax Court had jurisdiction under Section 6213 (a) of the Internal Revenue Code of 1954, 26 U. S. C., Sec. 1958 ed. 6213 (a).

Petitioner, a United States citizen, was engaged in private employment except for non-Civil Service, temporary employment by the United States Bureau of Public Roads in highway construction in Ethiopia and Iran for several tours of service during the years 1952-1962 (R. 88a-89a, 102a-104a).* The Commissioner concedes that petitioner remained in Iran the time required for exemption from United States income tax (R. 80a) but contends that petitioner's compensation was paid by the United States and is therefore taxable (R. 80a). Petitioner contends that his compensation was paid by Iran and is therefore not taxable.

Petitioner received refunds for the years 1952, 1954, 1957, 1958, and 1960, of United States income tax withheld from his compensation as an employee of the United States Bureau of Public Roads for service in Ethiopia and Iran (R. 90a). In 1956 the United States District Court for the Eastern District of Tennessee held that similar compensation was not subject to United States income tax. **Krichbaum v. United States**, 138 F. Supp. 515. The Government did not appeal the decision.

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* "R" references are to Appendix B to the Commissioner's Brief in the Court of Appeals.

Petitioner was assigned by the Bureau to Iran pursuant to an agreement of December 18, 1956, between the Imperial Government of Iran and the Bureau, entitled "General V. Ansari, Credit Agreement" as amended by letter of August 2, 1960, a credit agreement of December 7, 1956, which provided for an Export-Import Bank loan to the Imperial Government of Iran (R. 104a) and credit agreement of the International Bank for Reconstruction and Development with Iran (R. 105a).

A "Dollar Working Fund" was by agreement established by Iran with the Bureau for payment of the expenses of the highway program, including compensation of Bureau personnel (which included petitioner), in a "Trust Fund Account 13X8502(2)" entitled "Technical Assistance United States Dollars Advanced From Foreign Governments, Bureau of Public Roads" (R. 108a-109a).

The agreement provided that the Government of Iran would not impose taxes on the compensation of Bureau personnel (R. 107a).

All salaries and allowances received by petitioner for his service in Iran were paid from this Trust Fund Account established by Iran, from its own funds, with the United States Treasury Department to pay such expenses (R. 81a).

No funds credited to the Trust Fund were appropriated by the Congress of the United States for such purposes (R. 81a-82a, 108a-109a).

The funds in this account **belonged** to Iran, to which the Bureau as Trustee was required to make a final itemized accounting and to which any balance remaining had to be delivered (R. 81a, 107a). The Trust Agreement between Iran and the United States allowed the United States, the trustee, a fee of one (1) per cent of the trust fund expended for the account of Iran (R. 56a).

The furnishing of petitioner's services to the Iranian Government was **contingent** upon the deposit of the necessary funds by Iran (R. 82a, 109a).

REASONS FOR GRANTING WRIT.

1. The Court of Appeals incorrectly interpreted the legislative history of Code Section 911 (a) (2) as manifesting Congressional intent to tax, and not to exempt, petitioner's compensation notwithstanding that this history occurred **before** Congress had its mind on the as then yet unheard-of foreign aid program in which the petitioner participated, and before Congress could have had any intent with reference to the kind of situation presented in this case.

2. The Court of Appeals failed to consider or pass on a point raised by petitioner. The Court of Appeals, without explanation, denied the petition for rehearing although its original opinion had not mentioned this point which had been made and argued in petitioner's Brief and oral argument. The vague, inconclusive and non-discriminating legislative history relied on by the Court of Appeals throws no light on the narrow issue involved here and is outweighed by the force of the provisions of Sections 931 (i) and 934 (b) of the Code, which are in *pari materia* with Section 911 (a) (2) and must be construed together with it. The two other Sections enacted **after** 911 (a) (2), show a consummate ability by Congress to deal with the narrow issue involved here when Congress intends to do it. They provide that earnings of an employee of the United States from sources without the United States "shall be deemed to be derived from sources within the United States", whereas Sec. 911 excludes from tax **all** earned income from sources without the United States "except amounts paid by the United States or an agency thereof".

3. The decision of the Court of Appeals thwarts what it purports to find was the Congressional purpose of Section 911, "to spur Americans to work abroad . . .", because the decision deprives them of the principal inducement to work abroad by exposing them to the income tax.

4. The Agreement with Iran, governing petitioner's status, provides that Iran will not impose an income tax on his compensation, thus recognizing that Iran **could** have taxed his compensation. As the Agreement is silent on the United States income tax, it would be ironic to suppose that Iran supplied the petitioner's compensation and refrained from taxing it while leaving the United States free to tax it. It was thought essential for Iran to **agree** not to tax. It was not supposed that the United States would tax compensation earned outside the United States and not supplied at any cost to the United States.

5. The United States was not the owner, but only the trustee, of the funds furnished by Iran to pay the petitioner's compensation. Indeed, not only was petitioner paid with these funds, the United States itself was paid therefrom its trustee's compensation of 1 per cent of the trust funds disbursed by it for the account of Iran, creator of the trust. Iran paid petitioner **and paid the United States.**

6. If this were private litigation the Respondent would be estopped to impose the tax. Petitioner had a right to rely on **Krichbaum v. United States,** 138 F. Supp. 515 (E. D. Tenn. 1956), from which the Government did not appeal, and the successive tax refunds made to him.

7. An important question is raised respecting the meaning of provisions of the Internal Revenue Code on which the lower Federal Courts, being without guidance from this Court, have been reaching contrary results in the

decided cases, so that a particular individual's status as taxpayer depends on which Court is trying his case.

8. The decision of the Sixth Circuit in this case conflicts with that of the Ninth Circuit in **Erlandson v. Commissioner**, 277 F. 2d 70 (1960). In **Erlandson**, the Ninth Circuit, construing this Statute, held that the salary of an employee of a private company paid from funds furnished the company for that purpose by the United States was "paid by the United States" and hence not exempt from tax. The rationale of that decision is that the words "paid by the United States" refer to the **source** of the funds used in paying whereas in the case *sub judice* the Sixth Circuit interpreted the words as referring to the entity (the United States) which as a trustee of Iranian funds, issued the salary checks to petitioner.

9. The decision of the Court of Appeals erroneously interprets and applies the Statute and regulations. Petitioner's compensation cost the United States nothing, hence it was not "paid by the United States, or an agency thereof" within the statutory sense and it is not subject to the tax.

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LOWE WATKINS,
Counsel for Petitioner.

March 4, 1969.